California
Fair Political
Practices Commission

October 31, 1986

Teresa Craigie
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225 Bush Street
P.O. Box 7880
San Francisco, CA 94120

Re: Your Request for Advice
Our File No. A-86-284

Dear Ms. Craigie:

You have requested advice on behalf of Michael J. Halloran, a partner in the law firm Pillsbury, Madison & Sutro and a member of the Commission on Corporate Governance, Shareholder Rights and Security Transactions ("Commission on Corporate Governance"). Your letter concerns Mr. Halloran's duties under the conflict of interest and lobbying provisions of the Political Reform Act (the "Act").1/

QUESTIONS

1. Are members of the Commission on Corporate Governance "public officials" who are subject to the disqualification provisions of the Act?

2. Mr. Halloran is a registered lobbyist and Pillsbury, Madison & Sutro is a registered lobbying firm. Pillsbury, Madison & Sutro may receive compensation from one or more of its clients for the time Mr. Halloran spends in connection with Commission on Corporate Governance activities. Are Mr. Halloran's activities as a member of the Commission on Corporate Governance subject to disclosure as lobbying activities?

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

CONCLUSIONS

1. Members of the Commission on Corporate Governance are not "public officials." Therefore, they are not subject to the disqualification provisions of the Act.

2. Mr. Halloran's activities as a member of the Commission on Corporate Governance are subject to disclosure as lobbying activities.

FACTS

The Commission on Corporate Governance was established in 1986 by Senate Resolutions 41 and 50 of the 1985-86 Regular Session of the Legislature. It consists of 31 members, including seven members of the Senate, specified state elected officials and representatives of the public and private sectors with backgrounds in areas relating to corporate governance and securities transactions. The members of the Commission on Corporate Governance serve without compensation. Expenses incurred by the Commission on Corporate Governance are to be paid, first, from any private sector contributions provided for that purpose and, secondly, from such money from the Contingent Fund of the Senate as the Senate Rules Committee deems appropriate.

The duties of the Commission on Corporate Governance are to "study, analyze and recommend legislation relating to corporate governance, shareholder rights and securities transactions." In particular, Senate Resolution 41 provides:

> The commission shall evaluate laws relating to, and practices of, corporate management, investment managers and investors, with particular concern to reconciling the need to establish stability for corporations operating in or desiring to locate in California with the fiduciary obligations of investment managers and pension fund trustees to prudently invest shareholder funds. The commission shall be limited in the scope of its study only to the extent that the study shall not exceed a reasonable inquiry into the protections of California shareholders, as deemed by the commission chair.

The Commission on Corporate Governance is required to report its findings and recommendations to the Senate Rules Committee annually, on or before January 1. However, the Commission on Corporate Governance automatically terminates on January 1, 1988. Thus, the Commission on Corporate Governance will issue a maximum of two reports during its existence.

Mr. Halloran has been appointed to the Commission on Corporate Governance because of his knowledge of corporate securities laws. Legislation recommended by the Commission on Corporate Governance would probably affect clients whom Mr. Halloran represents in his capacity as a partner of Pillsbury, Madison & Sutro. It is possible that Pillsbury, Madison & Sutro would bill one or more of its clients for Mr. Halloran's time spent in connection with Commission on Corporate Governance activities. Mr. Halloran's compensation from Pillsbury, Madison & Sutro will not be affected as a result of his duties as a member of the Commission on Corporate Governance.

ANALYSIS

Your first question concerns the conflict of interest provisions of the Act. You have asked whether Mr. Halloran is subject to the conflict of interest provisions of the Act due to his membership on the Commission on Corporate Governance.

Section 87100 prohibits a public official at any level of state or local government from making, participating in, or attempting to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on, among other things:

> (a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.
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> * * *
>
> (c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.
>
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
>
> Section 87103(a), (c) and (d).

Mr. Halloran has an investment interest in Pillsbury, Madison & Sutro that is presumably worth $1,000 or more. He receives income from the law firm in excess of $250 per year, and he is also a partner in the law firm. Consequently, if Mr. Halloran's membership in the Commission on Corporate Governance makes him a "public official" within the meaning of Sections 87100 and 87103, he would be required to disqualify himself from participating in decisions which would have a foreseeable material financial effect on Pillsbury, Madison & Sutro.2/ Regulations 18702(b)(3) and 18702.2 (copies enclosed) contain the applicable guidelines for determining whether an effect on Pillsbury, Madison & Sutro will be considered material.

Regulation 18700(a) defines the term "public official" for purposes of Sections 87100 and 87103 as follows:

> (a) "Public official at any level of state or local government" means every natural person who is a member, officer, employee or consultant of a state or local government agency.
>
> (1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decision-making authority. A board or commission possesses decision-making authority whenever:
>
> (A) It may make a final governmental decision;
>
> (B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

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2/ Mr. Halloran has a less than 10-percent ownership interest in Pillsbury, Madison & Sutro. Therefore, the law firm's clients are not considered sources of income to Mr. Halloran (Section 82030(a)), and we shall not attempt to analyze the foreseeable financial effect of any decision on the firm's clients. However, if Mr. Halloran is a "public official," he would be required to disqualify himself from participating in any decision when there is a nexus between his work for Pillsbury, Madison and Sutro and the governmental decision to be made. Regulation 18702(b)(3)(B).

> (C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.
>
> (2) "Consultant" shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall not include a person who:
>
> (A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and
>
> (B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.
>
> Regulation 18700(a).

Mr. Halloran is not providing advice, recommendations or counsel under contract while acting as a member of the Commission on Corporate Governance. Therefore, he is not a "consultant" as defined in Regulation 18700(a)(2). The more difficult question to resolve is whether Mr. Halloran is a "member" of a state agency.

"State agency" includes every state office, department, division, bureau, board and commission, and the Legislature. Section 82049. This broad definition includes boards or commissions established by the Legislature and other state agencies. See, Siegel Opinion, 3 FPPC Opinions 62 (No. 76-054, July 6, 1977); Vonk Opinion, 6 FPPC Opinions 1 (No. 80-008, March 2, 1981). However, Regulation 18700(a)(1) specifies that the agency must have decisionmaking authority for its members to be considered public officials who are subject to the conflict of interest provisions of the Act. Therefore, we must examine whether the Commission on Corporate Governance has decisionmaking authority.

Applying the standards in Regulation 18700(a)(1), it appears that the Commission on Corporate Governance serves a solely advisory function. The Commission on Corporate Governance may recommend legislation to the Senate, but the final decision as to the introduction and enactment of any legislation rests with the Legislature. Similarly, the Commission on Corporate Governance cannot compel or prevent a final decision. Finally, the Commission on Corporate Governance will remain in existence only until January 1, 1988. During that time it must issue two reports. Due to its short lifespan, its recommendations cannot be regularly approved without significant amendment over an extended period of time.

We have previously considered whether other agencies which act in an advisory capacity are "state agencies" for purposes of the Act. This issue was litigated in Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com. (1977) 75 Cal. App. 3d 716. In that case the Court of Appeal upheld the Commission's determination that the "Little Hoover Commission" (established by Sections 8501-8541) did not serve a solely advisory function. The Court of Appeal based its decision on the agency's broad investigatory powers and its power to contract for services. The Commission on Corporate Governance differs from the "Little Hoover" Commission in that it was not established by statute, it has no investigatory or contractual powers, and it remains in existence for less than two years. In the aggregate, these factors make a substantial difference in the function of the Commission on Corporate Governance.

In 1983, we considered whether the Block Grant Advisory Task Force was a "state agency" for purposes of the Act. Gross Advice Letter (No. A-83-028) (copy enclosed). The Block Grant Advisory Task Force was established by Section 16367, effective January 1, 1982. It was automatically terminated July 1, 1984. The Task Force was designed to determine the availability and recommend the disposition of federal block grant funds made available to the states by the federal government. The Task Force was required to make recommendations to the Legislature and the Governor regarding priorities for allocation of funds. This report was to serve as a blueprint for legislation for receiving and expending the federal block grant funds. The Legislature appropriated $135,000 for support of the Task Force, including staffing, operating expenses, per diem, public notice and printing costs. Former Section 16367.2.

The Commission on Corporate Governance is similar to the Block Grant Advisory Task Force in that it makes recommendations regarding legislation on a specific subject and it is to be in existence for only a short period of time. However, unlike the Block Grant Advisory Task Force, the Commission on Corporate Governance is not established by statute and it reports only to the Senate, rather than both houses of the Legislature and the Governor. In addition, no specific amount of funds is allocated to the Commission on Corporate Governance to hire staff and carry out its duties.

Although this is a close question, the differences we have noted between the Commission on Corporate Governance and these two other state agencies support a conclusion that the Commission on Corporate Governance serves a solely advisory function. In particular, the fact that the Commission on Corporate Governance is established by one house of the Legislature, for the purpose of advising that house, limits the role of the Commission on Corporate Governance in the decisionmaking process. Therefore, we conclude that the Commission on Corporate Governance lacks decisionmaking authority. Accordingly, its members are not "public officials" who are subject to Sections 87100 and 87103.3/

Your second question concerns the lobbying provisions of the Act. You have asked whether Mr. Halloran's activities in connection with the Commission on Corporate Governance will be considered lobbying. If his activities are considered lobbying, Pillsbury, Madison & Sutro must include information about Mr. Halloran's activities in its lobbying firm reports. Furthermore, clients of Pillsbury, Madison & Sutro who have contracted for the lobbying services would be required to include information about payments in connection with those services on their lobbyist employer reports.

3/ There are members of the Commission on Corporate Governance who are "public officials" subject to Sections 87100 and 87103 because they hold other positions in state or local government. For example, the members of the Senate and other state officials who serve on the Commission on Corporate Governance do not lose their status as "public officials" for purposes of the Act while serving on the Commission on Corporate Governance. However, no member of the Commission on Corporate Governance is a "public official" solely because of his or her membership on the Commission on Corporate Governance.

You have informed us that Mr. Halloran's compensation from Pillsbury, Madison & Sutro will not be affected by his participation on the Commission on Corporate Governance. It is possible that Pillsbury, Madison & Sutro will bill certain clients for Mr. Halloran's time spent in connection with activities related to the Commission on Corporate Governance.

The first issue to address in answering this question is whether any of the activities Mr. Halloran would perform as a member of the Commission on Corporate Governance could be considered lobbying services. The work of the Commission on Corporate Governance includes recommending legislation to the Legislature. This work comes within the definition of "influencing legislative or administrative action," as set forth in Section 82032. In fact, while serving as a member of the Commission on Corporate Governance, Mr. Halloran will be engaging in direct communication with members of the Senate and other elected state officials and legislative officials who serve on the Commission on Corporate Governance. Accordingly, Mr. Halloran's activities in connection with the Commission on Corporate Governance would be considered lobbying services if he receives economic consideration, other than reimbursement for reasonable travel expenses, for engaging in these activities. Section 82039.

A similar question was decided by the Commission in the Morrissey Opinion, 2 FPPC Opinions 84 (No. 75-099, July 6, 1976). In that opinion, the Commission considered the question of whether Pacific Gas and Electric, a lobbyist employer, would be required to report salary payments to its nonlobbyist employee who was appointed to serve on an advisory committee and who engaged in direct communication with agency officials for the purpose of influencing administrative action. In Morrissey, the Commission concluded that the salary payments to the employee were not reportable, but stated that the facts presented a close question. The Commission found that the PG&E employee was invited to serve on the advisory committee because of his expertise in a particular field, rather than to represent PG&E's interests on the advisory committee.

The Morrissey Opinion is distinguishable from Mr. Halloran's situation, however. Mr. Halloran is currently a registered lobbyist for Pillsbury, Madison & Sutro. The employee in the Morrissey Opinion was employed as a land use planner. His duties at PG&E did not include influencing legislative or administrative action. However, since Mr. Halloran is already a registered lobbyist and his duties at Pillsbury, Madison & Sutro do include lobbying activities, we think that Pillsbury, Madison & Sutro must disclose on its

lobbying reports the payments it makes to Mr. Halloran for his activities as a member of the Commission on Corporate Governance. See, 60 Ops. Cal. Atty. Gen. 70 (1977) (copy enclosed).

Furthermore, if Pillsbury, Madison & Sutro is billing its clients for Mr. Halloran's time as a member of the Commission on Corporate Governance, we think Mr. Halloran is clearly acting to represent the interests of those clients when he performs his duties as a member of the Commission on Corporate Governance. In that situation, both Pillsbury, Madison & Sutro and the clients of that law firm who were charged for Mr. Halloran's services must disclose payments made or received in connection with Mr. Halloran's activities on the Commission on Corporate Governance.

Finally, we direct your attention to Section 70 of the Penal Code, which prohibits public officers, employees and appointees from receiving any gratuity, reward or compensation for doing an official act, except as authorized by law. This statute is not in the Political Reform Act; therefore, the Commission has no power to enforce or interpret it. However, we bring it to your attention as another factor for Pillsbury, Madison & Sutro to consider in deciding whether to bill clients for Mr. Halloran's activities as a member of the Commission on Corporate Governance.

If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Kathryn E. Donovan

By: Kathryn E. Donovan
Staff Counsel, Legal Division

DMG:KED:plh
Enclosures

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FPPC

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September 29, 1986

Office - Administration -
Political Reform Act

VIA FEDERAL EXPRESS

Ms. Kathryn E. Donovan
Counsel
Legal Division
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Dear Kathy:

In accordance with our recent telephone conversation, this is a request for written advice pursuant to Government Code § 83114(b) concerning the status of one of our partners who has been appointed to the Commission on Corporate Governance, Shareholder Rights and Security Transactions (the "Commission"). Specifically, we are requesting advice on the extent to which the Political Reform Act of 1974, as amended (the "Act") imposes obligations on persons serving on the Commission.

The Commission was established pursuant to Senate Resolutions 41 and 50 (copies enclosed). The Commission is specifically authorized to evaluate California laws relating to, and practices of, corporate management, investment managers and investors, with particular concern to reconciling the need to establish stability for corporations operating in or desiring to locate in California with the fiduciary obligations of investment managers and pension fund trustees to prudently invest shareholder funds. The scope of the Commission's study is limited to a reasonable inquiry into the protections of California shareholders. The Commission is directed to report its findings annually to the Legislature on or before January 1. The Commission automatically terminates, effective as of January 1, 1988.

Michael J. Halloran, a member of this law firm, has been appointed to the Commission. He will receive no special compensation for his Commission activities from this firm, the Commission or the Legislature. (However, his expenses may be reimbursed from the Contingent Fund of the Senate.) The firm may, or may not, receive compensation from one or more of its clients for Mr. Halloran's time spent in connection with Commission activities.

Mr. Halloran is a registered lobbyist and this firm is a registered lobbying firm under the Act.

As we discussed, under the Act, a member of the Commission could potentially (1) incur economic disclosure obligations as a "designated employee" (2) be subject to the conflict of interest provisions as a "public official" or (3) be required to register as a "lobbyist":

1. Designated Employee. Since the purpose of the Commission is purely advisory and no member of the Commission receives a government salary in connection with his activities thereon, we assume that members are not "designated employees" under the Act (see Government Code § 82019).

2. Public Official. FPPC Regulation Section 18700 provides, inter alia, that in order for a member of a government agency to be deemed to be a public official, he must serve on a board or commission which has decision-making authority. A commission has decision-making authority if it can make, compel or prevent a governmental decision or it:

> "makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or government agency" (2 Cal.Adm.Code § 18700(a)(1)(C)).

Since the Commission can neither make, compel nor prevent governmental decisions, is to be in existence for only a short period of time (less than two years) and its findings and recommendations may or may not be used by the Legislature, we assume that no member of the Commission will qualify as a "public official."

3. Lobbyist. Presumably, Commission members will not qualify as lobbyists if they do not receive compensation for their activities (Gov.Code § 82039; 2 Cal.Adm.Code § 18239).

As noted above, however, Mr. Halloran is a registered lobbyist and this firm is a registered lobbying firm. Mr. Halloran's income from the firm will neither be increased nor decreased by virtue of his Commission activities. Are Mr. Halloran's Commission activities subject to disclosure as lobbying activities, and does it make any difference if the firm is paid by one or more of its clients with respect to Mr. Halloran's Commission activities?

Thank you for your attention on this matter.

Very truly yours,

Teresa Craigie

cc: Mr. M. J. Halloran
Mr. F. K. Lowell

AMENDED IN SENATE JUNE 23, 1986

AMENDED IN SENATE JUNE 17, 1986

Senate Resolution No. 41

Introduced by Senator McCorquodale

May 23, 1986

Senate Resolution No. 41—Relative to the Senate Commission on Corporate Governance, Shareholder Rights and Securities Transactions.

WHEREAS, California investors own more than 15 percent of the total assets and debt obligations of corporations in the United States; and

WHEREAS, In 1984–85 the state government was involved with nearly $150 billion in securities transactions; and

WHEREAS, The state public pension funds hold nearly $80 billion in assets invested in corporate securities, bonds and real estate; and

WHEREAS, The present wealth and future retirement benefits of the citizens of California are managed by corporate directors, pension fund trustees, and investment managers based throughout the nation; and

WHEREAS, Unnecessary accumulation of corporate debt and the unproductive transfer of physical and financial corporate assets can be destabilizing to the state's welfare and economy; and

WHEREAS, The existing practices of some corporate directors and managers can abrogate the rights of shareholders; now, therefore, be it

Resolved by the Senate of the State of California, as follows:

funds. The commission shall be limited in the scope of its study only to the extent that the study shall not exceed a reasonable inquiry into the protections of California shareholders, as deemed by the commission chair.

(5) Any expenses incurred by the commission in carrying out its duties shall be paid, first, from any private sector contributions provided for this purpose and, secondly, from such money from the Contingent Fund of the Senate as the Senate Rules Committee deems appropriate.

(6) The commission shall report its findings and recommendations to the Senate Rules Committee annually, on or before January 1, until the commission is terminated on January 1, 1988; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the Governor, the Chair and members of the Senate Rules Committee, the Chair of the Assembly Rules Committee, and to the heads of the various departments within state government.

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Senate Resolution No. 50

Introduced by Senator McCorquodale

September 4, 1986

Senate Resolution No. 50—Relative to the Senate Commission on Corporate Governance, Shareholder Rights, and Securities Transactions.

Resolved by the Senate of the State of California, That the membership of the Senate Commission on Corporate Governance, Shareholder Rights, and Securities Transactions, as constituted by Senate Resolution No. 41 of the 1985–86 Regular Session shall be expanded to include the following:

(1) Two additional members of the Senate.

(2) One additional member with a background in business finance.

(3) One representative of the New York Stock Exchange.

(4) One representative of the American Stock Exchange.

(5) One representative of the North American Securities Dealers; and be it further

Resolved, That all other provisions of Senate Resolution No. 41 of the 1985–86 Regular Session shall remain in effect; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the Governor, the Chair and members of the Senate Rules Committee, the Chair of the Assembly Rules Committee, and to the heads of the various departments within state government designated in Senate Resolution No. 41.

O